Supreme Court, U.S.
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NO. 92-659

In the
Supreme Court of the United States

OCTOBER TERM, 1992

STEVEN L. EASLEY
PLAINTIFF - APPLICANT

versus

SOUTHERN SHIPBUILDING CORPORATION
DEFENDANT - RESPONDENT

PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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56 pp

QUESTIONS PRESENTED FOR REVIEW

1. Did the trial Court and the Court of Appeals err, as a matter of fact, in finding that the plaintiff's injury was caused by "the negligence of persons engaged in providing shipbuilding or repair services" or alternatively, did the Courts err in deciding this issue by means of a Summary Judgment?

2. Did the trial Court err in finding that, "irrespective of the traditional maritime nature of Easley's work on the occasions when he was aboard the NO. 6" . . . "Summary Judgment is proper when a permanently assigned land based worker nevertheless works eleven and one half per cent of his employment time on one of his employer's vessels, performing traditional seaman duties."

Respectfully submitted,

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2. Suzanne Easley, Applicant

3. Harold M. Wheelahan, III, Counsel for Applicants
   Dawn Adams Wheelahan
   Harold M. Wheelahan, III, PLC

4. John A. E. Davidson, Counsel for Applicants

5. Southern Shipbuilding Corporation, Respondent

6. Robert H. Murphy, Counsel for Respondent
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IN THE

SUPREME COURT OF THE UNITED STATES

STEVEN L. EASLEY
PLAINTIFF - APPLICANT

versus

SOUTHERN SHIPBUILDING CORPORATION
DEFENDANT - RESPONDENT

PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

REFERENCE TO OPINIONS

Applicant seeks review of the following opinions:

1. Order entered October 17, 1991, pending Motion for Summary Judgment on the issue of Seaman's Status

2. Order dated December 10, 1990, granting defendant's Motion to Dismiss or alternatively to grant a summary judgment on the grounds that plaintiff's sole remedy was under the LHWCA

3. Judgment dated December 12, 1990 dismissing plaintiff's claim with prejudice

4. July 30, 1990 opinion by the United States Court of Appeals, Fifth Circuit

5. The August 6, 1991, denial of Petition for Re-Hearing and Suggestion of Re-Hearing en banc by the United States Court of Appeals, Fifth Circuit

6. The March 23, 1992, opinion by the United States Supreme Court

7. The July 7, 1992, opinion by the United States Court of Appeals, Fifth Circuit.

GROUNDS ON WHICH JURISDICTION IS INVOKED

1. The judgment to be reviewed is an opinion by the United States Court of Appeals, Fifth Circuit, rendered July 7, 1992.

2. This Court has jurisdiction pursuant to 28 USCA 1254 and under Supreme Court rule 10.

STATUTES INVOLVED

The following statutes are involved in this case:

1. The Jones Act, 46 U.S.C.A. 688 et seq (text in appendix)

2. The Longshoreman and Harbor Worker's Compensation Act, 33 U.S.C.A. 901 et seq (text in appendix)

CONCISE STATEMENT OF THE CASE

(1) Nature of the case and course of proceedings and disposition below.

Plaintiff, Steven L. Easley, (hereinafter referred to as "Easley") has made claims under the Jones Act and the General Maritime Law against his employer, Southern Shipbuilding Corporation (hereinafter referred to as "Southern"). Southern is the owner and operator of the D/B SOUTHERN NO. 6, the salvage barge on which plaintiff was injured.

Easley instituted a negligence claim under the Jones Act, 46 USCA 688. Southern then filed a Motion for Summary Judgment claiming that Easley was not a seaman but, instead, was covered by the Longshoremen and Harbor Workers Compensation Act, 33 USCA 901, et seq. The trial Court granted the motion dismissing plaintiff's claim as a Jones Act seaman. Plaintiff then amended his claim to specify a claim against defendant under the General Maritime Law. Southern filed a Motion to Dismiss the plaintiff's remaining claims for failure to state a cause of action or, in the alternative, for a summary judgment as a matter of law. The Trial Court granted the defendant's motion, dismissing Easley's claim with prejudice. Plaintiff appealed the lower Court's rulings to the U.S. Fifth Circuit Court of Appeals which affirmed the Trial Court and denied Rehearing.

Easley applied to the United States Supreme Court for a Writ of Certiorari. This Honorable Court granted Easley's writ and remanded the case to the U.S. Fifth Circuit Court of Appeals for reconsideration consistent with the opinion of the Supreme Court in *Southwest Marine,*

Inc. v. Gizoni, 502 U.S. ____, 112 S. Ct. 486, 116 L.Ed. 2nd 405 (1991). On July 7, 1992, the United States Court of Appeals for the Fifth Circuit affirmed, holding that Easley was not entitled to bring a negligence action either as a seaman under the Jones Act or as a shipbuilder under Section 905(b) of the LHWCA.

(2) Statement of Facts.

The D/B SOUTHERN NO. 6 is a salvage barge equipped with two large cranes and several air tuggers. It also has a regular crew. In addition to the D/B SOUTHERN NO. 6, the defendant owned and operated three other vessels, the M/T F.N. CANULETTE (the tug which was used to move the D/B SOUTHERN NO. 6), the D/B SOUTHERN NO. 1 (a smaller crane barge), and an unnamed workboat.

Plaintiff had been employed by the defendant, Southern Shipbuilding Corporation, (hereinafter referred to as "Southern") for many years prior to the date of the accident made the basis of this claim. His job title was "mechanic". (Appendix, pages 7 and 9) The trial court found that Easley spent the majority of his time repairing railroad cranes, yard equipment, cutting grass, and in maintenance of land based cranes. (Appendix, page 5) Those same records reveal that in the month of his accident, he worked one hundred fifty nine hours. Of that, he spent one hundred fifty one hours working on land and eight working on the D/B SOUTHERN NO. 6. He did no direct longshoring or shipbuilding work. (Appendix, page 25) Easley testified that he was also the regular substitute deckhand aboard the D/B SOUTHERN NO. 6. On the date of the accident made the basis of this claim, one of the regular D/B SOUTHERN NO. 6 crewmembers was unavailable for work and was replaced by plaintiff. (Appendix, page 20). Easley was working as the deckhand aboard

the D/B SOUTHERN NO. 6 at the time of his accident. His supervisor, Charles Earl Cunningham, testified to that fact.

On the date of the accident, the D/B SOUTHERN NO. 6 was engaged in salvage operations. It was raising a barge from the bottom of the Mississippi River. (Appendix, page 25) Easley was injured when working from a flatboat which was an appurtenance to the D/B SOUTHERN NO. 6, while attempting to lower a sling and shackles to assist the diver in the salvage operation. When the A-frame crane operator of the D/B SOUTHERN NO. 6 shoved a group of shackles and their attached sling overboard, the sling or a tugger line attached to it struck Easley in the back, knocking him to the ground. The person who shoved the sling and shackles overboard, Bobby Moree, was a regular member of the crew and was second in command of the D/B SOUTHERN NO. 6 at the time of the accident, reporting only to Earl Cunningham. According to Cunningham, the man in charge, the accident was caused by Bobby Moree and a co-worker shoving the shackles and sling overboard without holding on to them. The plaintiff, Easley, did nothing wrong to cause this accident. The District Court found that "regular substitute status does not equal permanent assignment to a vessel for purposes of satisfying the *Barrett* requirements" and dismissed the Jones Act claim. (Appendix, page 2).

With respect to Easley's General Maritime Law claim, the Court found that plaintiff spent his time working on repairing land cranes and locomotive cranes, repairing yard equipment, cutting grass, working in the compressor room, maintaining the dry dock, and substituting as a deckhand. However, the Court further found Easley's maintenance and repair of machinery and equipment "provides support to the shipbuilders and repairers. Therefore

the Court finds that the plaintiff is barred from suing his employer under Section 905(b) of the Act." (Appendix, page 6)

The U.S. Court of Appeals for the Fifth Circuit upheld the Trial Court. This Honorable Court, as stated above, considered the matter on a Writ of Certiorari and remanded it back to the U.S. Court of Appeals for the Fifth Circuit for reconsideration in light of this Honorable Court's opinion in *Gizoni*, supra. Upon reconsideration, the Court of Appeals made two findings. First, it found that, because Easley's injury was caused by the negligence of persons engaged in providing shipbuilding or repair services, his claim against his employer, who was also the vessel owner, under the LHWCA, Section 905(b) is barred. Second, the Court of Appeals found that, because Easley worked only eleven and one half percent of his employment time on the vessel, performing traditional seaman's duties, he did not have an employment related connection to a vessel in navigation sufficient to confer seaman status.

BASIS OF FEDERAL JURISDICTION

The Trial Court had jurisdiction over this matter pursuant to the Jones Act 46 U.S.C.A. 688 et seq, the General Maritime Law, and possibly the LHWCA, 33 U.S.C.A. 901 et seq.

ARGUMENT

QUESTION NO. 1:

DID THE TRIAL COURT AND THE COURT OF APPEALS ERR, AS A MATTER OF FACT, IN FINDING THAT THE PLAINTIFF'S INJURY WAS CAUSED BY "THE NEGLIGENCE OF PERSONS ENGAGED IN PROVIDING SHIPBUILDING OR REPAIR SERVICES" OR, ALTERNATIVELY, DID THE COURTS ERR IN DECIDING THIS ISSUE BY MEANS OF A SUMMARY JUDGMENT?"

Even assuming Easley does not qualify for Jones Act seaman status under *Gizoni*, supra, the Fifth Circuit Court of Appeals found that:

> "When, in a situation involving an employer who was the shipowner, there has been a primary determination that the worker is not a seaman for purposes of the Jones Act but that he is covered by the LHWCA, and a secondary determination that the worker's trade is that of a shiprepairer or any of the other occupations listed in Section 905(b), the worker is barred by the terms of that section from maintaining a negligence action against his employer, assuming that 'the injury was caused by the negligence of persons engaged in providing shipbuilding or repair services.' " 965 F.2d 1 at page 3.

The Court of Appeals apparently found that Easley's injury was caused by the negligence of persons engaged in providing shipbuilding or repair services. This is factually incorrect. The record plainly reveals that Easley was injured as a result of the negligence of a member of the crew of the SOUTHERN NO. 6, the A-frame operator, who

shoved shackles overboard, causing Easley to be struck by a line attached to an air tugger and to the shackles. (R.E. pp 159, 160, and 111)

Because of this factual error, the Court incorrectly found that, assuming Easley was covered under the LHWCA, because Easley was injured by another worker covered by the LHWCA (the factual error) he was unable to maintain a negligence action against his employer as vessel owner. Obviously, this error, revealed by the record, requires a reversal of both the District Court and the U.S. Fifth Circuit Court of Appeals.

Alternatively, the status of the employee at fault was not properly resolved by means of a Summary Judgment.

QUESTION NO. 2:

DID THE TRIAL COURT ERR IN FINDING THAT, "IRRESPECTIVE OF THE TRADITIONAL MARITIME NATURE OF EASLEY'S WORK ON THE OCCASIONS WHEN HE WAS ABOARD THE NO. 6, "SUMMARY JUDGMENT IS PROPER WHEN A PERMANENTLY ASSIGNED LAND BASED WORKER NEVERTHELESS WORKS ELEVEN AND ONE HALF PER CENT OF HIS EMPLOYMENT TIME ON ONE OF HIS EMPLOYER'S VESSELS, PERFORMING TRADITIONAL SEAMAN DUTIES."

In reconsidering the matter presently before the Court in light of *Gizoni*, supra, the U.S. Fifth Circuit Court of Appeals relied upon its analysis set forth in *Barrett v. Chevron U.S.A., Inc.*, 781 F.2d 1067 (5th Cir., 1986).

The court set forth the issue as follows:

> "For the purposes of the case sub judice, we must decide whether, as a matter of law, Summary Judgment is proper when a permanently assigned land based worker nevertheless works eleven and a half per cent of his employment time on one of his employer's vessels, performing traditional seaman duties." Id at page 5.

Framed differently, more accurately, the question presented is this:

> "If a worker has two jobs for the same employer, one of which involves working one day out of nine aboard his employer's vessels, performing traditional seaman's duties, is it proper, as a matter of law, to grant a Summary Judgment denying a worker's seaman status?"

In answering that question, one must consider that Easley was working aboard the salvage vessel at his employer's convenience. He had been the regular substitute deckhand aboard the salvage vessel for years. On the voyage that resulted in Easley's injury, he was assigned to the salvage vessel, the D/B SOUTHERN NO. 6, for the duration of its one day voyage. Is this different from a worker who worked only one day out of nine but exclusively on his employer's vessel? Easley submits it is not.

Easley submits that as the regular substitute deckhand aboard the D/B SOUTHERN NO. 7 who was assigned to that vessel for the length of its one day voyage he was entitled to present his claim of Jones Act seaman's status to a jury.

Salvage operations have long been governed by

maritime law. The roots of our modern law of salvage can be traced to the ancient and medieval sea codes which were, in turn, adaptations of the salvage concepts developed in Roman law. These concepts were developed by the seafarers who inhabited the Greek Island of Rhodes, which was the dominant sea power in Europe nine hundred years before the birth of Christ. Baer, *Admiralty Law of the Supreme Court,* 3rd Edition, 1979, Section 20.3 at pages 576 - 77. The principles of salvage found in these old sea codes are recognized by all maritime nations. *Baer,* at page 579. The vessel upon which the plaintiff was injured on the date of his accident, the D/B SOUTHERN NO. 6, is owned by the plaintiff's employer, Southern Shipbuilding Corporation. The D/B SOUTHERN NO. 6 is used for salvage work. Salvage operations constitute three to four per cent of Southern Shipbuilding Corporation's work. The D/B SOUTHERN NO. 6 has a regular crew.

Plaintiff submits that the Motion for Summary Judgment should have been denied because at the time of his accident, there is much evidence to support a finding that he was, in fact, a seaman and therefore can not be covered by the Longshoremen and Harbor Workers' Compensation Act. The LHWCA describes the class of workers covered by this statute as follows:

> "The term 'employee' means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor worker including ship repairmen, shipbuilders, and shipriggers, but such term does not include . . a master or member of the crew of any vessel . ."

By its terms, the LHWCA does not cover "a master or member of a crew of any vessel". Easley was, in the words of his boss on the date of the accident, a deckhand

assigned to the D/B SOUTHERN NO. 6. He therefore can not be covered by the LHWCA.

There is an evidentiary basis for a Jones Act case to go to the jury: (1) if there is evidence that the injured workman was assigned permanently to a vessel (including special purpose structures not usually employed as a means of transport by water but designed to float on water) or performed a substantial part of his work on the vessel; and (2) if the capacity in which he was employed or the duties which he performed contributed to the function of the vessel or the accomplishment of its mission or to the operation or welfare of the vessel in terms of its maintenance during movement or during anchorage for future trips. *Offshore v. Robison,* 266 F.2d 769 (5th Cir., 1959). The status determination as a whole is an inherently factual question and as cases since *Robison,* make clear, it is generally a question for the fact finder. The cases also make clear, however, that status may be determined by Summary Judgment in the appropriate situation. That situation exists where facts establish beyond question, as a matter of law, the lack of seaman status. A Court may, in the proper case, hold that there is no reasonable evidentiary basis to support a jury finding that the injured person is a seaman. *Barrett v. Chevron U.S.A., Inc.* 781 F.2d 1067 (5th Cir., 1986). However, "if reasonable persons, applying the proper legal standard, could differ as to whether the employee as a 'member of a crew' it is a question for the jury". *McDermott Int'l, Inc. v. Wilander,* 498 U.S. 1, 111 S. Ct. 807 112 L.Ed. 2d 866 (1991) quoting *Anderson v. Liberty* 477 U.S. 242, 250 - 251 (1986).

Here, there is a reasonable evidentiary basis for a jury to determine that plaintiff was a seaman. Defendant would have the Fifth Circuit's *Barrett* test apply to this situation to determine that, because Easley only spent

about eleven per cent of his time in the year of his accident aboard his employer's vessels, with the balance of his time working on land, that he is necessarily a longshoreman and not a seaman. More recently, however, the Supreme Court has defined the test for determining status:

> "We believe the better rule is to define 'master or member of a crew' under the LHWCA, and therefore 'seaman' under the Jones Act, solely in terms of the employee's connection to a vessel in navigation. This rule best explains our case law, and is consistent with the pre-Jones Act interpretation of 'seaman' and Congress' land-based/sea-based distinction. All who work at sea in the service of a ship face those particular perils to which the protection of maritime law, statutory as well as decisional, is directed." (*Wilander* supra at page 10).

As stated above, plaintiff submits that a mechanical application of *Barrett,* supra, is inapplicable in the type of fact situation presented by this case. Plaintiff had two separate jobs. They happened to both be in the employ of Southern, but under other circumstances, need not have been. Had he been injured cutting grass on land or repairing a land based crane, his remedies would be determined by land based law. However, Easley was not injured on land. He was injured while serving as deckhand aboard a salvage vessel. He was injured as a result of the negligence of the regular crew of that vessel. As the regular substitute deckhand, it is submitted that he should not be precluded from asserting a Jones Act claim by means of a Summary Judgment.

The review of a grant of a Summary Judgment is de novo, using the same criteria relied on by the District Court in the first instance. *Walker v. Sears Roebuck & Co.,* 853 F. 2d 355 (5th Cir., 1988)

CONCLUSION:

In affirming, the District Court's granting of a Summary Judgment, dismissing the Jones Act and General Maritime Law claims of a deckhand on a salvage vessel, the Court of Appeals for the 5th Circuit was both factually and legally incorrect.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for a Writ of Certiorari has been forwarded to all counsel of record by placing a copy of same in the United States mail, postage prepaid, addressed to the offices of said attorneys this 2nd day of October, 1992.

_____

Harold M. Wheelahan, III

APPENDIX A

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

FILED
OCT 1 1990

STEVEN L. EASLEY	Civil Action
VERSUS	No. 90-517
SOUTHERN SHIPBUILDING CORP.	Section "I" (3)

ORDER AND REASONS

Before the court is the defendant's motion for summary judgment on the issue of seaman status. After reviewing the motion, memoranda of counsel, the record, and the law, the court grants the motion for the reasons set forth below.

On May 30, 1989, Steven Easley was assisting in a salvage operation in the Mississippi River when he was struck in the back by a "tag line" or "tugger" cable. Mr. Easley has brought suit, alleging Jones Act negligence, seeking damages for the injuries he received in the accident. The plaintiff maintains that he is a seaman, entitled to recovery under the Jones Act. The defendant claims that the plaintiff is not a seaman but is a harbor worker, entitled to compensation under the Longshoremen and Harbor Workers' Compensation Act, 33 U.S.C. section 901.

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On the day of the accident, Mr. Easley was working on board the D/B SOUTHERN NO. 6, replacing a seaman who was unavailable for work. However, Mr. Easley's regular job with Southern Shipbuilding was as a mechanic in their shipyard. In order to prove that he is a seaman, entitled to compensation under the Jones Act, the plaintiff must show that: (1) he was permanently assigned to a vessel or performed a substantial part of his work on a vessel; and (2) the capacty in which the plaintiff performed contributed to the function of the vessel, its mission, its operation, or its welfare. *Barrett v. Chevron U.S.A., Inc.*, 782 F.2d 1067 (5th Cir. 1986?).

In the proper case a court may find that as a question of law, a plaintiff does not have seaman status under the Jones Act. *Beard v. Shell Oil Co.*, 606 F.2d 515, 517 (5th Cir. 1979). To prevail on a summary judgment motion, the moving party bears the initial burden of proving that no genuine issue of material fact exists. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

For purposes of a summary judgment motion, the plaintiff's assertions will be considered correct. The plaintiff urges the court to consider that he was the regular substitute deckhand assigned to the D/B SOUTHERN NO. 6. The court prefers to look at the nature of the work actually done by the plaintiff and not his job titles. *See Gizoni v. Southwest Marine Inc.*, 909 F.2d 385 (9th Cir. 1990). Regular substitute status does not equal permanent assignment to a vessel for purposes of satisfying the *Barrett* requirements.

The issue that must be resolved by the court is whether the plaintiff satisfies the *Barrett* requirement that a seaman spend a substantial part of his work on a vessel. The Fifth Circuit has stated that to prove that the plaintiff

did substantial work on a vessel, he must show that he "performed a significant part of his work aboard the vessel with at least some degree of regularity and continuity." *Barrett*, 781 F.2d at 1074 (quoting *Barrios v. Engine & Gas Compressor Servs., Inc.*, 669 F.2d 350, 353 (5th Cir. 1982); *see also Dove v. Belcher*, 686 F.2d 329, 333 (5th Cir. 1982). The plaintiff here asserts that he worked 11.5% of the time on a vessel between January 1989 to May 1989. The other evidence provided to the court indicates that the percentage of his time spent on a vessel over the past few years was even lower. Accepting the plaintiff's figures as true, the court still finds that the plaintiff could not reasonably be found a seaman.

The plaintiff's assignment to the vessel was not a "regular and continuous" change in his normal function as a machinist in the shipyard. *Id.* at 1075 (quoting *Longmire v. Sea Drilling Corp.*, 610 F.2d 1342, 1347 n.6 (5th Cir. 1980)). Rather, the plaintiff's assignment to the vessel was intermittent and transitory while his permanent job assignment remained land-based. Because the evidence taken in the light most favorable to the plaintiff can lead only to the conclusion that the plaintiff was not a seaman, granting summary judgment in favor of the defendant is proper. *Id.* at 1074.

Accordingly,

IT IS ORDERED that the defendant's motion declaring the plaintiff not to be a seaman is GRANTED and the hearing scheduled for October 12, 1990 is CANCELLED.

New Orleans, Louisiana this 17 day of October, 1990.

s/s Henry A. Mentz, Jr.

UNITED STATES DISTRICT JUDGE

APPENDIX B

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

FILED
DEC 11 '90

STEVEN L. EASLEY	CIVIL ACTION
VERSUS	NO. 90-0517
SOUTHERN SHIPBUILDING CORP.	SECTION "I" (3)

ORDER AND REASONS

Before the court is a motion to amend to clarify his general maritime law claim filed by the plaintiff, Steven L. Easley. Also before the court is a motion filed by the defendant seeking the court either to dismiss or alternatively, to grant a summary judgment on the grounds that the plaintiff's sole remedy is under the Longshore and Harbor Workers Compensation Act. After reviewing the motions, memoranda of counsel, the record, and the law, the court denies the motion to amend and grants the motion for summary judgment for the reasons given below.

Under section 905(b) of the Longshore and Harbor Workers Compensation Act (the Act), 33 U.S.C. sections 901-950, a person injured by the negligence of a vessel is allowed a remedy against the vessel as a third party. However, if the person was employed as a shipbuilder, ship reparier, or ship breaker, he cannot maintain an action

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against the vessel if his employer was the owner of the vessel. *Id.* section 905(b).

At the time of his accident, Steven L. Easley (Easley) was an employee of Southern Shipbuilding Corp. (Southern). Southern operates a shipyard in Slidell, Louisiana and its business is ship repair and construction. Easley was employed as a machinist/mechanic. The defendant claims that Easley's job was to help fabricate metal parts and components for incorporation into vessels that Southern was building or repairing, and to maintain and repair machinery in the shipyard and on vessels. The plaintiff disputes that he was engaged in any ship repair or shipbuilding work; he claims that he spent his time working on or repairing land cranes and locomotive cranes, repairing yard equipment, cutting grass, working in the compressor room, maintaining the drydock, and occasionally substituting as a deckhand.

After reviewing the time sheets attached to the plaintiff's motion to amend, the court finds that the plaintiff's description of his activities is correct. However, in order to be covered by the JAct, a plaintiff need not be a ship builder or ship repairer but need only be "directly involved" in such work. *Alabama Dry Dock & Shipbuilding Co. v. Kininess,* 554 F.2d 176, 178 (5th Cir. 1977) (quoting *Jacksonville Shipyards v. Perdue,* 539 F.2d 533, 540 (5th Cir. 1976)).

In *Alabama Dry Dock*, the plaintiff was injured when he fell from an elevated hopper while sandblasting a crane. 554 F.2d at 177. The Fifth Circuit held that the plaintiff was "directly involved" in shipbuilding activities because the crane he was sandblasting, once assembled, would be used in hauling ship parts to the ship. *Id.* at 178. The plaintiff here is in an analogous position: Although he

is not repairing or building ships, his maintenance and repair of machinery and equipment provides support to the shipbuilders and repairers. Therefore, the court finds that the plaintiff is barred from suing his employer under section 905(b) of the Act.

Furthermore, a person covered by the Act has no general maritime claim for unseaworthiness. *See Scindia Steam Nav. Co., Ltd. v. De Los Santos,* 451 U.S. 156 (1981); T. Schoenbaum, Admiralty and Maritime Law, § 6-10 (1987). Employers of shipbuilders/ship repairers are exclusively liable for compensation under the Act; they are immune from other liability. T. Schoenbaum, *Admiralty and Maritime Law,*§ 6-10. Therefore, the plaintiff's claim for general maritime law damages cannot be maintained.

Accordingly,

IT IS ORDERED that the plaintiff's motion to amend is DENIED.

IT IS FURTHER ORDERED that the defendent's motion to dismiss or alternatively, for summary judgment be GRANTED in the alternative, and a judgment be entered dismissing the plaintiff's claims with prejudice, each side to bear his own costs. The hearing scheduled for DECEMBER 5, 1990 was CANCELLED.

New Orleans, Louisiana this 10 day of December, 1990.

/s/ Henry A. Mentz, Jr.

UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

FILED
DEC 13 '90

STEVEN L. EASLEY	CIVIL ACTION
VERSUS	NO. 90-517
SOUTHERN SHIPBUILDING CORPORATION	SECTION I

J U D G M E N T

Considering the Court's Order and Reasons entered herein on December 11, 1990.

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendant, Southern Shipbuilding Corporation, and against plaintiff, Steven L. Easley, dismissing said plaintiff's complaint with prejudice. Each paraty is to bear its own costs.

New Orleans, Louisiana, this 12th day of December, 1990.

/s/ Henry A. Mentz, Jr.
UNITED STATES DISTRICT JUDGE

DATE OF ENTRY DEC 13 1990

APPENDIX D

Steven L. EASLEY,
Plaintiff-Appellant,

v.

SOUTHERN SHIPBUILDING CORPORATION,
Defendant-Appellee.

No. 91-3021

Summary Calendar.

United States Court of Appeals,
Fifth Circuit.

July 30, 1991.

Shipyard employee brought action against shipyard under Jones Act, general maritime law, and negligence provisions of the Longshore and Harbor Workers' Compensation Act (LHWCA). The United States District Court for the Eastern District of Louisiana, Henry A. Mentz, Jr., Jl, granted shipyards' motions for summary judgment and motion to dismiss, and employee appealed. The Court of Appeals, Wiener, Circuit Judge, held that: (1) employee was "ship repairman" who could recover benefits under LHWCA but who could not maintain negligence action, and (2) as covered employee under LHWCA, employee could not maintain unseaworthiness claim under general maritime law.

Affirmed.

Harold M. Wheelahan, III, New Orleans, La., John A.E. Davidson, Metairie, La., for plaintiff-appellant.

David J. L'Hoste, Russel B. Ramsey, Gibbens & L'Hoste, New Orleans, La., for defendant-appellee.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before JOHNSON, SMITH, and WIENER Circuit Judges.

WIENER, Circuit Judge:

Plaintiff-Appellant Steven L. Easley appeals from the district court's grant of motions for summary judgment and a motion to dismiss filed by the Defendant-Appellee Southern Shipbuilding Corporation (Southern), on the question of Easley's status as a ship repairer/longshoreman or as a seaman. Finding that the district court properly granted summary judgment and dismissed the plaintiff's claim, we affirm.

I.

FACTS

Southern is a shipyard in Slidell, Louisiana. In addition to the repair and construction of vessels, Southern performs salvage operations. At the time of his injury Easley had been employed by Southern for approximately twenty years. For about two and one half years prior to his injury Easley worked as a mechanic.[1] His duties included repair-

[1] Prior to his current job assignment, Easley had worked for Southern for years as a deckhand assigned to one or another of the vessels used

ing land cranes, locomotive cranes, and yard equipment, cutting grass, working in the compressor room, and maintaining Southern's dry dock. In addition to these jobs, Easley occasionally worked as a substitute deckhand aboard the D/B SOUTHERN NO. 6 (the NO. 6), a derrick barge owned by Southern and often used in salvage operations. Easley was injured in May of 1989 while substituting on the NO. 6 for a regular crewman on a one day salvage job in the Mississippi River.

Easley filed suit against Southern, alleging that he was a seaman entitled to coverage under the Jones Act, 46 U.S.C.App. § 688, and that he was injured through Southern's negligence. He also included a claim of unseaworthiness under the general maritime law. Southern filed a motion for summary judgment on the issue of Easley's seaman status, which motion was granted by the district court. The court reasoned that because Easley did not perform a substantial part of his work on a vessel, he was not eligible for seaman status. Easley moved to amend his complaint to clarify his general maritime law claim and to add a negligence action under § 5(b) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* (LHWCA). Southern filed a motion to dismiss under Fed.R.Civ.P. 12(b)(6), or in the alternative for summary judgment, claiming that Easley's exclusive remedy is pro-

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Footnote 1 continued.

by Southern in its shipbuilding and salvage operations. Because he desired more family time, early in 1987 Easley asked to be reassigned to land duties. He was made a mechanic, but he agreed to fill in as a deckhand at his employer's convenience. His supervisor recollects that only once during Easley's tenure as a mechanic had he assisted in a salvage operation aboard the NO. 6. Although Easley asserts that he spent as much as eleven per cent of his time during the four months before his injury "aboard his employer's vessels," he does not specify whether he spent that time as mechanic or as deckhand.

vided by the LHWCA, but that he was ineligible to file a negligence action under LHWCA § 5(b) because he was a ship repairer or shipbuilder, two classes of employee precluded from proceeding under that section of the Act. The district court granted Southern's motion[2] and denied Easley's motion to amend his complaint. The court reviewed Easley's time sheets, and found that (1) Easley was a ship repairer, a class of workers enumerated within the LHWCA, (2) the LHWCA was his exclusive remedy, (3) as a covered employee under the LHWCA, Easley had no general maritime claim for unseaworthiness, and (4) that as a ship repairer he was excepted from that class of workers who may maintain a negligence action under LHWCA § 5(b) in addition to his claim for compensation. Easley timely appealed the decisions of the district court.

II.

STANDARD OF REVIEW

[1] This court reviews the grant of summary judgment motions *de novo,* using the same criteria used by the district court in the first instance. *Walker v. Sears, Roebuck & Co.,* 853 F.2d 355, 358 (5th Cir.1988). We "review the evidence and inferences to be drawn therefrom in the light most favorable to the non-moving parties." *Baton Rouge Bldg. & Constr. Trades Council v. Jacobs Constructors, Inc.,* 804 F.2d 879, 881 (5th Cir.1986) (per curiam) (citing *Southmark Properties v. Charles House Corp.,* 742 F.2d 862, 873 (5th Cir.1984)). Summary judgment is proper "if the pleadings, depositions, answers to

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[2] The district judge granted Southern's motion to dismiss/motion for summary judgment in the alternative. Because the district judge indicated in his opinion that he reviewed evidence in addition to the pleadings, we think the motion should be treated as one for summary judgment.

interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-24, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986).

III.

STATUS: SEAMAN OR LONGSHOREMAN

Yet again, this court must decide whether a maritime worker is entitled to compensation benefits or negligence remedies or both; and, if so, which benefits and remedies. Easley claims that he is a seaman entitled to the remedies provided by the Jones Act. In the alternative, he claims that he is a longshoreman entitled both to compensation benefits and to negligence remedies afforded by the LHWCA. Finally, he claims that he is entitled to an action for unseaworthiness under the general maritime law.

The LHWCA applies to any "employee' whose "disability or death results from an injury occurring upon the navigable waters of the United States." 33 U.S.C. § 903. To come within the coverage of the Act, a worker must meet both a "status" and a "situs" requirement. *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 105 S.Ct. 1421, 84 L.Ed.2d 406 (1985). Situs is not at issue here as Easley was indisputably injured while serving on a vessel which was located in the Mississippi River at the time of the occurrence.

[2,3] The "status" test, on the other hand, is crucial to the results of this case. That test seeks to determine if the nature of the employee's work and duties bring him within the ambit of the LHWCA. The LHWCA defines

"employee" as "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operation, and any harbor-worker including a ship repairman, shipbuilder, and shipbreaker." § 2(3). It explicitly excludes from this definition, and therefore from coverage under the LHWCA, "a master or member of a crew of any vessel." *Id.* "Member of the crew" is virtually synonymous with "seaman". *See White v. Valley Line Co.*, 736 F.2d 304, 305 (5th Cir.1984). Therefore, anyone who is a "seaman" for Jones Act purposes is a "member of the crew" under the LHWCA, and thus excluded from its coverage.

[4] This court has repeatedly determined that the Jones Act and the LHWCA are mutually exclusive. *Pizzitolo v. Electro-Coal Transfer Corp.*, 812 F.2d 977, 983 (5th Cir.), *reh. denied* 484 U.S. 1059, 108 S.Ct. 1013, 98 L.Ed.2d 978 (1988). A worker cannot be both a seaman for Jones Act purposes and a longshoreman under the LHWCA. *McDermott Int'l, Inc. v. Wilander*, ___ U.S. ___, 111 S.Ct. 807, 813, 112 L.Ed.2d 866 (1991).

In the past, this court sought an appropriate framework in which to determine whether a worker is a seaman or a longshoreman. In 1987, with *Pizzitolo*, we resolved the question and settled on an workable analysis: "Although we have on occasion analyzed the question of whether an employee engaged in longshoring or ship repairing was a member of the crew of a vessel ... we are persuaded that such an analysis is unnecessary if the employee is engaged in an occupation expressly enumerated in the [LHWCA]". *Id.* at 983 (footnote omitted).[3] After *Pizzitolo*,

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[3] This court re-examined this framework in *Leonard v. Dixie Well Service & Supply, Inc.*, 828 F.2d 291 (5th Cir.1987). We re-confirmed our *Pizzitolo* holding, but indicated that a seaman-status analysis is still appropriate when considering occupations other than those enumerated in

when defining the status of a maritime worker as either a seaman or longshoreman, we first determine whether the worker is "engaged in an occupation expressly enumerated" by the LHWCA in § 2(3). If he belongs to an enumerated class of workers, he is covered by the LHWCA, so we will normally not inquire into his status as a seaman. *Id.*.

Nonetheless, our analysis does not end there, Section 5(b) provides that a worker covered by the LHWCA may also sue a vessel if his injury was caused by the vessel's negligence.[4] However, a person employed to provide shipbuilding, ship repairing, or shipbreaking services cannot proceed against his employer "in whole or in part or directly or indirectly" if the employer was "'the vessel's owner, owner pro hac vice, agent, operator, or charterer." § 5(b).

[5] Critical to our inquiry, then, is whether Easley is a shipbuilder or ship repairman. "If the employee's permanent duties, or his interim duties over an appreciable period of time, are such that he would be a covered ship repairer within the meaning of § 902(3) of the LHWCA, then he is barred from bringing suit against his employer under

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Footnote 3 continued.

§ 2(3). *Leonard*, 828 F.2d at 296. The following year we decided *Legros v. Panther Services Group, Inc.*, 863 F.2d 345 (5th Cir.1988), in which we modified the *Pizzitolo* framework to again include a seaman-status analysis under appropriate circumstances. The *Legros* decision, however, was vacated when we granted suggestion of rehearing *en banc*. *Legros*, 863 F.2d at 355. The appeal was later dismissed on motion of one of the parties. *See Legros v. Panther Services Group, Inc.* 874 F.2d 953 (5th Cir.1989). Because the original *Legros* opinion was vacated, *Pizzitolo* remains the law of this circuit.

[4] If the vessel owner is the longshoreman's employer, the employee may sue only if the employer was negligent in his capacity as vessel owner. *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 530, 103 S.Ct. 254, 2547, 76 L.Ed.2d 768 (1983).

§ 905(b)." *Gay v. Barge 266*, 915 F.2d 1007, 1010 (5th Cir.1990). Because we conclude that Easley falls within that classification, our analysis need not proceed further. Although, as a shipbuilder or ship repairer, he is a longshoreman under the Act, he is excluded from the additional negligence remedies otherwise available under § 5(b).

True, § 2(3) expressly includes in its definition of "employee" the occupations of ship repairman, shipbuilder and shipbreaker; but, nowhere does it define or otherwise delineate the activities which constitute those occupations. "When making a determination of whether a claimant is 'engaged in an occupation expressly enumerated' in the LHWCA, the activity engaged in at the time of the injury should be considered along with the general employment activities." *Chauvin v. Sanford Offshore Salvage, Inc.*, 868 F.2d 735, 738 n. 22 (5th Cir.1989). *See also Thibodeaux v. Torch, Inc.*, 858 F.2d 1048 (5th Cir.), *reh. denied* 862 F.2d 874 (1988). According to his deposition and his time slips, Easley performed a number of duties in and around the Southern Shipbuilding yard. In just the month before his injury, he worked on locomotive cranes and yard equipment; performed on shore maintenance on a gantry, the dry dock, a work boat, and portable tools; worked in the compressor room; and performed other on shore maintenance chores. His time slips and his position indicate that these were his normal activities over the two and one half years that he worked as a mechanic for Southern. In addition, at the time of his injury Easley had been assigned to substitute as a deckhand on the NO. 6 for but a singe day, a type of duty he performed intermittently, at most, when one of the permanent crew members was unavailable.

[6] The plaintiff also argues that he is not a ship-

builder or ship repairman because he did not personally build or repair ships. It is not necessary that a worker, however, actually build or repair ships to be included within these classifications. He must only be directly involved in the shipbuilding or repair process. *Alabama Dry Dock and Shipbuilding Co. v. Kininess,* 554 F.2d 176 (5th Cir.), *cert. denied* 434 U.S. 903, 98 S.Ct. 299, 54 L.Ed.2d 190 (1977). In *Kininess* the plaintiff was injured while sandblasting rust from parts of an unassembled crane. Once assembled, the crane itself would be directly involved in the shipbuilding process. Because the injured worker's activity was a necessary prerequisite to the crane's use, the worker was found to be directly involved in the shipbuilding process. *Id.* at 178. *See also Alford v. American Bridge Div., United States Steel Corp.,* 642 F.2d 807, 812-13 (5th Cir.), *modified in part* 655 F.2d 86 (1981), *cert. denied* 455 U.S. 927, 102 S.Ct. 1292, 71 L.Ed.2d 472 (1982); *Ingalls Shipbuilding Corp. v. Morgan,* 551 F.2d 61, 62 (5th Cir.), *cert. denied* 434 U.S. 966, 98 S.Ct. 508, 54 L.Ed.2d 453 (1977).

The district court was correct in concluding that Easley was a ship repairman as a matter of law. As a mechanic who repaired and maintained equipment used in the shipbuilding and repair process he supported those who actually built and repaired ships. Clearly, Easley's duties directly furthered the shipbuilding or ship repair process. Therefore, he is a shipbuilder or repairer for purposes of the LHWCA.

Easley further argues that (1) he cannot be a shipbuilder or ship repairman because many of his principal duties were so far removed from the process that he could not possibly be considered directly involved, and (2) at the time of his injury, he was engaged as a deckhand on the NO. 6 and was therefore totally removed from the ship-

building /repair process. Both of these arguments fail. It is well settled in this circuit that the measure of longshoreman status is the character of the employee's work taken as a whole, not in piecemeal time increments or in distinct but temporary job assignments.[5] We examine not just the work in which he was engaged at the moment of his injury, but the entirety of his duties. *Gay v. Barge 266*, 915 F.2d 1007, 1010 (5th Cir.1990). Furthermore,

> [f]ocusing solely on the employee's activity at the time of injury might bar suits by a whole host of workers in other maritime occupations who are injured while temporarily performing repair work.... [T]o deny [the plaintiff] a cause of action in the morning but to grant him one in the afternoon is to make his rights under the ACT as random and indiscriminate as the sea herself.

Id. at 1010-11. *See also Burks v. American River Transp. Co.*, 679 F.2d 69 (5th Cir.1982).

This view is consistent with our approach in seaman-status cases under the Jones Act and "member of the crew" cases under the LHWCA. In those cases we look to

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[5] Only when his permanent job assignment has changed during the course of his employment is a worker entitled to have the substantiality of his vessel-related work evaluated for a period less than the total time employed by his current employer. *Lormand v. Superior Oil Co.*, 845 F.2d 536, 540 (5th Cir.1987). Easley presented no evidence that his permanent job assignment changed from mechanic to deckhand. He argued instead that he had two distinct and separate jobs at Southern—mechanic and "regular substitute deckhand." However, Easley presented no evidence that his job classification changed, that he was paid separately, or that he was distinguished in any other way when he was intermittently assigned to work aboard the NO. 6. In fact, the record indicates that his deckhand time was accounted for in the same way as was the time when he was performing his other duties, and that he was paid his standard wage regardless of the type of work he performed during the pay period.

the context of the work performed aboard vessels within the larger sphere of the worker's assignment with his employer. *See Lormand v. Superior Oil Co.*, 845 F.2d 536, 540 (th Cir.1987), *cert. denied* 484 U.S. 1031, 108 S.Ct. 739, 98 L.Ed.2d 774 (1988); *Barrett v. Chevron, U.S.A.*, 781 F.2d 1067, 1076 (5th Cir.1986).[6] If we were to analyze Easley's assignment with respect to seaman status instead of longshoreman status, we would be forced to the same conclusion even accepting the plaintiff's argument that he was a "regular" substitute deckhand. Easley's sporadic and intermittent assignments to Southern's vessels simply were not substantial in the context of his employment.[7] Moreover, with the exception of his occasional deckhand assignments, we see nothing in the record that would distinguish any of his activities as clearly non-ship repair under the standards set forth in *Kininess* and the cases cited above.

Easley's position is similar to that of the plaintiff in *Chauvin v. Sanford Offshore Salvage, Inc.*, 868 F.2d 735 (5th Cir.1989). Chauvin normally worked in his employer's salvage yard and assisted in the repair of his employer's salvage barge. When the barge performed offshore salvage work, Chauvin was assigned to it. 868 F.2d at 736. In the two months prior to his injury, he had spent only two days doing seaman's work. *Id.* at 739. At the time of his accident, Chauvin was helping transport equipment to another salvage barge. *Id.* at 736-37. Even though the court found

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[6] A seaman does not lose his status as a seaman simply because he is temporarily assigned to shore duty. *Smith v. Odom Offshore Surveys, Inc.*, 791 F.2d 411 (5th Cir.1986). Likewise, a longshoreman does not lose his status as a longshoreman simply because he was assigned deckhand duties intermittenly.

[7] Even had Easley performed a substantial portion of his work aboard vessels, he cannot be a seaman because, we find, he is a member of an enumerated classification under the LHWCA. *See Pizzitolo*, 812 F.2d 977 (5th Cir.1987).

that Chauvin was engaged in longshoring duties at the time of his injury, the court reasoned that " :if we were to utilize the test of Chauvin's activity against his general employment background, he would fall within one of the LHWCA enumerated occupations.' .... Chauvin's activities at the time of his injury as well as his general employment require him to be classified as a longshoreman within the meaning of the LHWCA." *Id.* at 739 (quoting the district court's opinion).

We find that because a substantial amount of his work contributed to the shipbuilding/repair process. Easley was a shipbuilder or ship repairman. As a member of an occupation enumerated in § 2(3), Easley is a covered worker but is limited to those compensation remedies to which all covered workers are entitled under the LHWCA. As a shipbuilder or ship repairman, he may not maintain an action for negligence against his employer or the vessel.

IV.

GENERAL MARITIME LAW CLAIM

[7] In 1972 Congress enacted § 5(b) of the LHWCA which overruled the Supreme Court's holding in *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099 (1946). *Sieracki* allowed longshoremen a cause of action for unseaworthiness against a vessel owner. Section 5(b) expressly eliminated the unseaworthiness action for all employees covered by the LHWCA. *McDermott Int'l, Inc. v. Wilander*, ____ U.S. ____, 111 S.Ct. 807, 112 L.Ed.2d 866 (1991). Because Easley is a covered employee under the LHWCA, he is not entitled to any remedies stemming from the warranty of seaworthiness. His remedies will only be found within the four corners of the LHWCA.

V.

CONCLUSION

Easley's duties and recent work record clearly show that he was directly involved with the shipbuilding or ship repair process. As a shipbuilder/ship repairman, Easley is a member of a class of workers specifically enumerated as falling within the ambit of the LHWCA. As a longshoreman he may not bring an action for unseaworthiness under the general maritime law or for negligence under the Jones Act. Furthermore, as a shipbuilder/ship repairman, Easley is prohibited from bringing an action for negligence against the vessel or his employer as shipowner under LHWCA § 5(b). So, because he is a shipbuilder or ship repairman, Easley's recovery under the LHWCA is limited to compensation benefits to the extent he is eligible for them.

AFFIRMED.

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-3021

FILED
AUG 26 1991

STEVEN L. EASLEY,

Plaintiff-Appellant,

versus

SOUTHERN SHIPBUILDING CORP.,

Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 07/30/91, 5 Cir., 198__, ____F.2d____)

(August 26, 1991)

Before JOHNSON, SMITH and WIENER, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

s/s Illegible

UNITED STATES CIRCUIT JUDGE

APPENDIX F

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

March 23, 1992

Mr. Harold M. Wheelahan III
Ungar & Wheelahan
830 Royal Street
New Orleans, LA 70116

Re: Steven L. Easley
v. Southern Shipbuilding Corporation
No. 91-885

Dear Mr. Wheelahan:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of Southwest Marine, Inc. v. Gizoni, 502 U.S. ----- (1991).

Very truly yours,

/s/ William K. Suter
William K. Suter, Clerk

APPENDIX G

Steven L. EASLEY
Plaintiff-Appellant,

v.

SOUTHERN SHIPBUILDING CORPORATION
Defendant-Appellee.

No. 91-3021
Summary Calendar.

United States Court of Appeals,
Fifth Circuit.

July 7, 1992.

Shipyard employee brought action against shipyard under Jones Act, general maritime law and negligence provision of Longshore and Harbor Workers' Compensation Act (LHWCA). The United States District Court for the Eastern District of Louisiana, Henry A. Mentz, Jr., granted shipyard's motions for summary judgment and motion to dismiss. Employee appealed. The Court of Appeals, 936 F.2d 839, affirmed. The Supreme Court, 112 S.Ct. 1463, granted certiorari, vacated judgment, and remanded for further consideration. On remand, the Court of Appeals, Wiener, Circuit Judge, held that: (1) when in situation involving employer who was shipowner, there had been primary determination that worker was not seaman for Jones Act purposes but was covered by LHWCA and secondary determination that worker's trade was that of occupation listed in LHWCA section giving workers negligence action against owner of vessel, worker

was barred by terms of that section from maintaining negligence action against his employer, assuming that injury was caused by negligence of persons engaged in providing shipbuilding or repair services; (2) worker whose occupation was listed in LHWCA definition of "employees" was not automatically barred from claiming coverage under Jones Act, and key to issue of "seaman" status was employment-related connection to vessel in navigation; and (3) subject employee, a permanently assigned land-based worker who spent at most 11½% of his employment time on vessel, was not "seaman" for purposes of Jones Act.

Affirmed.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before JOHNSON, SMITH, and WIENER, Circuit Judges.

ON REMAND FROM THE
UNITED STATES SUPREME COURT

WIENER, Circuit Judge:

This court previously affirmed the grant of a summary judgment by the district court for the Eastern District of Louisiana, on facts set out in greater detail in our opinion.[1] As a result of its recent pronouncement regarding the status of seamen vis-a-vis longshoremen and harbor workers, the Supreme Court vacated our decision in *Easley I,* remanding it for reconsideration in light of *Southwest Marine, Inc. v. Gizoni.*[2] We do so now.

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[1] *Easley v. Southern Shipbuilding Corp.* (*Easley I*), 936 F.2d 839 (1991).

[2] ___ U.S. ___, 112 S.Ct. 486, 116 L.Ed.2d 405 (1991).

I.

FACTS

Steven Easley was employed by Southern Shipyards for approximately twenty years. At the time of his accident, Easley was working as a mechanic. His duties included repairing landbased locomotive cranes, stationary cranes, and yard equipment; cutting grass; working in the compressor room; and maintaining Southern's dry dock. Easley also worked occasionally as a substitute deck hand aboard the D/B SOUTHERN NO. 6 (the NO. 6), a derrick barge owned by Southern and most often used in salvage operations. Easley claims to have worked—and for purposes of this appeal we assume that he did work—eleven and a half percent of his time on the NO. 6. Easley was injured in May of 1989 while substituting for a regular crewman as a deckhand on the NO. 6 on a one-day salvage job on the Mississippi River.

Easley filed suit against Southern, alleging that he was a seaman and entitled to recover under the Jones Act[3] for injuries received as a result of Southern's negligence. In granting Southern's motion for summary judgment on the question of seaman status, the district court reasoned that as Easley did not perform a substantial part of his work on a vessel he was not eligible for seaman status. Easley then amended his complaint, claiming negligence under § 905(b) of the Longshore and Harbor Workers' Compensation Act (LHWCA).[4] The district court granted Southern's motion for summary judgment on the § 905(b) claim too, finding that Easley was a ship repairer, one of several classes of workers expressly excluded from coverage under § 905(b).

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[3] 46 U.S.C. App. §688 (1988).

[4] 33 U.S.C. § 901 *et seq.* (1988).

We affirmed the district court, and Easley applied to the Supreme Court for a writ of certiorari. When the Court released its opinion in *Gizoni*, it granted Easley's writ and remanded the case to us for reconsideration consistent with that opinion.

II.

ANALYSIS

Our affirmation in *Easley I* of the district court's limitation on Easley's recovery followed two parallel lines of reasoning. One line involved the relationship between Easley's status under the LHWCA and his asserted status as a seaman under the Jones Act. The second line involved the relationship between Easley's regular job as a ship repairer and his desire to proceed with a negligence action against Southern under § 905(b) of the LHWCA. We discuss these two lines of reasoning below in inverse order to determine the effect of *Gizoni* on each.

A. *Analysis Unaffected by* Gizoni

[1] Our second line of reasoning in *Easley I*—concerning the ability of a ship repairer to bring a negligence action under § 905(b) of the LHWCA—was unaffected by the *Gizoni* decision. This court has stated in the context of the LHWCA that "[i]f the employee's permanent duties, or his interim duties over an appreciable period of time, are such that he would be a covered ship repairer within the meaning of § 902(3) of the LHWCA, then he is barred from bringing [a negligence] suit against his employer under § 905(b)."[5] When, in a situation involving

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[5] *Gay v. Barge 266*, 915 F.2d 1007, 1010 (5th Cir.1990). Section 2(3) of the LHWCA lists occupational titles that are "employees" under the Act.

an employer who is the shipowner, there has been a primary determination that the worker is not a seaman for purposes of the Jones Act but that he is covered by the LHWCA, and a secondary determination that the worker's trade is that of ship repairer or any of the other occupations listed in § 905(b), the worker is barred by the terms of that section from maintaining a negligence action against his employer, assuming that "the injury was caused by the negligence of persons engaged in providing shipbuilding or repair services."[6] This analysis remains correct; it was not affected by *Gizoni.*

B. *Analysis Overruled by* Gizoni

[2] By contrast, the *Gizoni* decision implicitly overruled this circuit's position on the inability of a worker whose job description is listed in § 902(3) of the LHWCA to claim Jones Act coverage as a seaman. We had held, in *Pizzitolo v. Electro-Coal Transfer Corp.,*[7] that a worker's occupation was one "expressly enumerated in the [LHWCA]" and the worker met the Act's situs requirement, no inquiry would be made into the worker's status as a seaman—thus, there could be no negligence action under the Jones Act. The worker would be limited to compensation under the LHWCA because, as discussed earlier, these workers cannot bring a negligence action under § 905(b).

Footnote 5 continued.

Section 5(b) of the Act gives workers a negligence action against the owner of a vessel, but excludes classes of workers, one of which is ship repairers, if they are employed by the vessel and are injured by the negligence of someone similarly employed.

[6] 33 U.S.C. § 905(b).

[7] 812 F.2d 977, 983 (5th Cir.), *reh'g denied,* 823 F.2d 552 (1987), *cert. denied,* 484 U.S. 1059, 108 S.Ct. 1013, 98 L.Ed.2d 978 (1988).

When, in *Gizoni,* the Supreme Court held that a worker whose occupation was listed in § 902(3) was not automatically barred from claiming coverage under the Jones Act, it overruled *Pizzitolo.* The district court in *Gizoni* had granted summary judgment because "Gizoni was a harbor worker precluded from bringing his action by the exclusive remedy provisions of the LHWCA, 33 U.S.C. § 905(a)."[8] The Supreme Court stated that the district court's holding, though "in line with Fifth Circuit precedent, ... ignores the fact that some maritime workers may be Jones Act seaman performing a job specifically enumerated under the LHWCA." The Court stated further that " '[i]t is not the employee's particular job that is determinative, but the employee's connection to a vessel.' "[9]

C. *Easley's Status*

The *Gizoni* decision nullifies the facet of our *Easley I* analysis which held that because Easley's position was one listed in § 902(3) of the LHWCA, he could not be covered by the Jones Act. *Gizoni* does not, however, foreclose the ability of the district court to grant summary judgment regarding seaman status for workers whose jobs, like Easley's, are thus listed, when undisputed facts (other than such a listing) support such a judgment. *Gizoni* relies extensively on *McDermott International, Inc. v. Wilander,*[10] in which the Supreme Court stated that, although the jury is to find the facts and apply the legal standard of seaman status to the facts thus found, the trial court "must not abdicate its duty to determine if there is

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[8] 112 S.Ct. at 490 (citing App. to Pet. for Cert. 1-2).

[9] *Id.* at 492 (quoting *McDermott Int'l, Inc. v. Wilander,* ___ U.S. ___, 111 S.Ct. 807, 818, 112 L.Ed.2d 866 (1991)).

[10] 111 S.Ct. at 818.

a reasonable basis to support" a jury's conclusion that seaman status existed.[11] The *Wilander* Court continued, "summary judgment or a directed verdict is mandated where the facts and the law will reasonably support only one conclusion."[12] Thus, after *Gizoni*, the question for this court in our plenary review of a grant of summary judgment on the issue of seaman status—ultimately an issue of fact—is whether application of the legal standard set out in *Wilander*[13] to the undisputed historical facts of the case under consideration makes summary judgment for the defendant proper because the law will not reasonably support another conclusion.

[3] The *Wilander* Court declared that the key to the issue of "seaman status is *employment-related connection to a vessel in navigation.*"[14] To grant summary judgment for the defendant, a court must determine that there is no reasonable basis in fact to support a jury verdict that the plaintiff's connection to the vessel in question is sufficient to bestow seaman status.[15]

Although the Court did not precisely define the boundaries of the seaman status, it held that "a necessary element of the connection is that a seaman perform the work of the vessel."[16] The Court also quoted *Maryland*

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[11] *Id.*

[12] *Id.* at 818 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 250-51, 106 S.Ct. 2505, 2510, 2511-12, 91 L.Ed.2d 202 (1986)).

[13] The district court granted summary judgment regarding seaman status four months before *Wilander* was decided.

[14] 111 S.Ct. at 817 (emphasis added).

[15] *Id.* at 818.

[16] *Id.*

Casualty Co. v. Lawson, stating " '[t]here is implied a definite and permanent connection with the vessel, an obligation to forward her enterprise.' " [17] In the instant case, the district court held as a matter of law that Easley could not be a seaman. For the purposes of its consideration, the court assumed the truth of Easley's allegation that he worked eleven and a half percent of his time on the NO. 6 and spent his remaining time performing his primary responsibilities of land-based work. On that basis the court held that as Easley failed to perform a "substantial part of his work on a vessel," he was not a seaman as a matter of law.[18]

[4] This court reviews the grant of summary judgment *de novo*, using the same criteria relied on by the district court in the first instance.[19] For the purposes of the case *sub judice*, we must decide whether, as a matter of law, summary judgment is proper when a permanently assigned land-based worker nevertheless works eleven and a half percent of his employment time on one of his employer's vessels, performing traditional seaman duties.

For purposes of this inquiry, it is important to note that just as the worker's performance of non-maritime work does not prohibit seaman status, his performance of traditional maritime work does not confer seaman status. Based on the summary judgment evidence in the record of this case, viewed in the light most favorable to the non-movant, we find that as to the NO. 6 Easley did not have the "employment-related connection to a vessel in navigation"

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[17] *Id.* at 817 (quoting *Lawson*, 94 F.2d 190, 192 (5th Cir.1938)).

[18] *See Barrett v. Chevron, U.S.A. Inc.*, 781 F.2d 1067, 1074 (5th Cir.1986) (en banc).

[19] *Walker v. Sears Roebuck & Co.*, 853 F.2d 355, 358 (5th Cir.1988).

required by *Wilander*, and therefore could not be deemed a seaman for purposes of coverage under the Jones Act. Irrespective of the traditional maritime nature of Easley's work on the occasions when he was aboard the NO. 6, the irregularity of his intermittent stints of short duration on that vessel, sporadically interspersed between long periods of performing his regular land-based functions, eschews the substantial and enduring relationship to the vessel envisioned in *Gizoni*, *Wilander*, and *Lawson*. Easley's connection to the NO. 6 was simply too attenuated to constitute seaman status.

[5,6] To understand fully the concept of "employment-related connection to a vessel in navigation," we look to this circuit's traditional definition of a Jones Act seaman announced decades ago in *Offshore Co. v. Robison*.[20] To be covered as a seaman under the Jones Act, a worker must:

(1) be permanently assigned to a vessel in navigation *or* perform a substantial part of his work on the vessel; and (2) contribute to the mission of the vessel. Easley was not permanently assigned to the NO. 6; he was a land-based employee. Neither did he perform a substantial part of his work on the vessel. Clearly neither *Robison* nor *Wilander* and *Gizoni* envision a "snap-shot" test for seaman status, inspecting only the situation as it exists at the instant of injury; a much more enduring relationship is contemplated in the jurisprudence. At least three cases in this circuit involved workers who spent greater percentages of their employment time on vessels than did Easley, yet the worker in each case was held not to be seaman as a matter

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[20] 266 F.2d 769 (5th Cir.1959), *cited approvingly in Wilander*, 111 S.Ct. at 817; *see also Lawson*, 94 F.2d at 192.

of law.[21] We do not imply that the quantum or percentage of a worker's time spent on a vessel in navigation is either the sole factor or the determinative factor in the search for seaman status. But considering this circuit's consistent precedent, it is impossible for us to conclude that Easley, who spent at most eleven and a half percent of his time on a vessel, was a seaman for purposes of the Jones Act, particularly when viewed in light of other factors affecting his connection with the subject vessel.

III.

CONCLUSION

Upon revisiting this appeal as instructed by the Supreme Court on remand following the Court's *Gizoni* decision, we still find no reversible error in the district court's summary judgment to the extent that it held that Easley was not a Jones Act seaman. Consequently, the holding of the district court that Easley is not entitled to bring a negligence action either as a seaman under the Jones Act or as a shipbuilder under § 905(b) of the LHWCA is AFFIRMED.

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[21] *See Palmer v. Fayard Moving & Transp. Corp.* 930 F.2d 437, 439 (5th Cir.1991) (holding, after the *Wilander* decision, that a worker who spent nineteen percent of her time aboard a vessel was not covered by the Jones Act as a matter of law); *Barrett*, 781 F.2d at 1074-75 (en banc) (holding a worker "who performed no more than twenty to thirty percent of his work on vessels" not to be a seaman); *Ward v. Reeled Tubing, Inc.*, 637 F.Supp. 33, 37-38 (E.D.La.1986) (holding worker who spent twenty percent of his time on vessels was not a seaman).

APPENDIX H

VERBATIM TEXT OF 33 U.S.C.A. 902

"Definitions:

When used in this chapter: (3) The term 'employee' means any person engaged in Maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor worker including a ship repairman, a ship builder, and ship breaker, but such term does not include - (g) a master or member of a crew of an vessel."

APPENDIX I

VERBATIM TEST OF 33 U.S.C.A. 905(b)

"NEGLIGENCE OF VESSEL:

In the event of injury of a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed to provide ship building, repairing, or breaking services and such person's employer was the owner, owner pro hac vice, agent, operator, or charterer of the vessel, no such action shall be permitted, in whole or in part or directly or indirectly, against the injured person's employer (in any capacity including as the vessel's owner, owner pro hac vice, agent, operator, or charterer) or against the employees of the employer. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter."

APPENDIX J

VERBATIM TEXT OF 46 U.S.C.A. 688

"Recovery for injury to or death of seaman (a) application of railway employee statutes; jurisdiction.

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply; and in case of death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such action shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

(2)

Supreme Court, U.S.
FILED
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No. 92-659

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

STEVEN L. EASLEY,
Petitioner,

v.

SOUTHERN SHIPBUILDING CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Respondent, Southern Shipbuilding Corporation, disagrees with Petitioner's statement of the questions presented for review. The questions presented for consideration are:

1. Whether summary judgment dismissing Petitioner's claim of negligence under § 905(b) of the LHWCA was appropriate, where there was no genuine issue of material fact and the United States Court of Appeals for the Fifth Circuit and the district court found that Petitioner, as a ship repairer/shipbuilder, was prohibited from bringing a negligence action under § 905(b) of the LHWCA?

2. Whether summary judgment dismissing Petitioner's Jones Act claim and general maritime law claims were appropriate, where no genuine issue of material fact existed and where the courts below correctly applied the proper legal standards concerning Petitioner's employment status?

LIST OF INTERESTED PERSONS AND RULE 29.1 CERTIFICATION

The parties to the proceeding below were Petitioner-Plaintiff, Steven L. Easley, Suzanne Easley (his wife), and Respondent-Defendant, Southern Shipbuilding Corporation.

Under this Court's Rule 29.1, Respondent, Southern Shipbuilding Corporation, certifies that it has no parent companies and no subsidiaries.

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Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Southern Shipbuilding Corporation ("Southern"), submits that there is no basis for granting a writ of certiorari in this case. The district court was presented with the material undisputed facts and, based on those facts, together with the application of the appropriate law, granted summary judgments dismissing Petitioner's negligence actions brought under the Jones Act and 33 U.S.C. § 905(b). The court of appeals correctly determined that no reasonable fact finder could conclude that Petitioner was a Jones Act seaman, and that Petitioner was a ship repairer or shipbuilder limited to compensation remedies against his employer under the Longshore and Harbor Workers' Compensation Act ("LHWCA") 33 U.S.C. §§ 901, *et seq.* The decisions of the court of appeals and the district court neither raise any unsettled issues warranting this Court's attention,

nor conflict with any decision of this Court or any United States Court of Appeals. Petitioner has presented no compelling reason for granting certiorari to review carefully reasoned summary judgments completely supported by the controlling law. Petitioner's application for a writ of certiorari should, therefore, be denied.

STATEMENT OF THE CASE

Petitioner's statement of the course of proceedings and disposition below at pages 3-4 of his writ petition correctly recounts the procedural history of this case. In addition, the relevant facts, all of which are uncontested, are fully set forth in the decisions of the district court and the Fifth Circuit, which are reproduced as appendices to Easley's writ petition. However, Respondent restates the pertinent facts as follows:

A. The Undisputed Facts

Southern Shipbuilding Corporation operates a shipyard in Slidell, Louisiana, where it repairs and constructs vessels, in addition to performing salvage operations. Petitioner Easley, a 20-year employee with Southern, worked as a "mechanic" in the shipyard. His duties included repairing cranes and shipyard equipment, as well as cutting grass, working in the compressor room and maintaining Southern's drydock.

In earlier years, Easley had worked as a deckhand aboard Southern's vessels, but since 1987, at his own request, he was reassigned to the aforementioned duties as a land-based mechanic. However, at the time of his accident in May 1989, Easley was working on a one-day assignment as a temporary deckhand aboard one of his employer's vessels, the D/B SOUTHERN NO. 6. As Easley concedes at page 4 of his writ petition, of the total 159 hours he worked in the month before his accident, he spent only eight hours on a vessel, while spending the remaining 151 hours, or approximately 95% of his time, on land as a shipyard mechanic.

Although Easley styles himself as a "regular substitute deckhand" the undisputed facts established that he had worked aboard a vessel for only a single day at the time of his injury, that his deckhand duties were only sporadic and intermittent, and that he filled in only because permanent crewmembers were unavailable. Easley presented no evidence that his permanent job assignment as a land-based worker had changed in the two and one-half years preceding his accident, that his wage rate changed depending on the type of work he performed, or that he accounted for his time any differently for his minimal and random vessel-related work.

B. The District Court Proceeding

As Easley notes at page 3 of his petition for a writ of certiorari, he initially filed a negligence claim against Southern under the Jones Act. The district court granted Southern's motion for summary judgment, dismissing this claim on grounds that Easley was not a seaman. In its "Order and Reasons" entered on October 18, 1990, (*see* pages A-1 through A-3 of Easley's writ petition), the district court applied the two-part test for determining seaman status set forth in *Barrett v. Chevron, U.S.A., Inc.*, 781 F.2d 1067 (5th Cir. 1986) (*en banc*):

> In order to prove that he is a seaman, entitled to compensation under the Jones Act, the plaintiff must show that: (1) he was permanently assigned to a vessel or performed a substantial part of his work on a vessel; and (2) the capacity in which plaintiff performed contributed to the function of the vessel, its mission, its operation, or its welfare.

Writ petition, page A-2. Citing *Gizoni v. Southwest Marine, Inc.*, 909 F.2d 385 (9th Cir. 1990), which this Court later affirmed, the district court specifically stated that it would "look at the nature of the work actually done by the plaintiff and not his job titles" in deciding the motion for summary judgment. *Id.*

Applying this correct statement of law to the undisputed facts, the district court concluded that Easley's assignments to his employer's vessel were "intermittent and transitory," whereas "his permanent job assignment remained land-based." *See* writ petition, page A-3. Even accepting plaintiff's assertion that he had worked 11.5% of his time on a vessel, the court found that this temporary vessel assignment was not a regular and continuous change in his normal function as a mechanic in the shipyard. *Id.* Thus, even when viewed in a light most favorable to the plaintiff, the evidence could not reasonably lead to a conclusion that Easley was a seaman.

After the district court dismissed his Jones Act claim, Easley moved to amend his complaint to allege a claim in negligence under 33 U.S.C. § 905(b) and the general maritime law. Southern moved to dismiss this claim on grounds that Easley's sole remedy against his employer and its vessel was compensation under the LHWCA. Viewing the undisputed evidence again in the light most favorable to the plaintiff, the district court concluded that Easley's job of repairing cranes, working in the compressor room, and maintaining the drydock supported his employer's shipbuilding and ship repair business. Because Easley was thereby directly involved in shipbuilding and ship repair work, the court found him to be a shipbuilder or ship repairer barred by the express provisions of 33 U.S.C. § 905(b) from suing his employer or its vessel for damages. *See* district court's "Order and Reasons" entered on December 11, 1990 (reproduced at pages A-4 through A-6 of Petitioner's writ petition).

C. The Fifth Circuit's First Opinion

On July 30, 1991, the United States Court of Appeals for the Fifth Circuit affirmed the district court's rulings. *Easley v. Southern Shipbuilding Corp.*, 936 F.2d 839 (5th Cir.), *reh'g denied*, 943 F.2d 1315 (5th Cir. 1991) (*en banc*), reproduced at pages A-8 through A-20 of Easley's writ petition. Citing this Court's decision in

McDermott Int'l., Inc. v. Wilander, 498 U.S. ——, 111 S.Ct. 807, 112 L.Ed.2d 866 (1991), the Fifth Circuit recognized that a maritime worker "cannot be both a seaman for Jones Act purposes and a longshoreman under the LHWCA." 936 F.2d at 842; writ petition, page A-13. The court of appeals then proceeded to analyze the undisputed facts and held that the district court had correctly found that Easley was a ship repairer covered by the LMWCA rather than a Jones Act seaman. The Fifth Circuit looked to both seaman-status cases under the Jones Act and "member of the crew" cases under the LHWCA and concluded:

> If we were to analyze Easley's assignment with respect to seaman status instead of longshoreman status, we would be forced to the same conclusion even accepting the plaintiff's argument that he was a "regular" substitute deckhand. Easley's sporadic and intermittent assignments to Southern's vessels simply were not substantial in the context of his employment. Moreover, with the exception of his occasional deckhand assignments, we see nothing in the record that would distinguish any of his activities as clearly non-ship repair . . . .

936 F.2d at 844-845; writ petition, page A-18. The Fifth Circuit therefore affirmed the summary judgments concluding that Easley was not a Jones Act seaman, but was a covered worker directly involved in the shipbuilding or repair process and thus precluded by 33 U.S.C. § 905(b) from asserting an action for negligence against his employer or its vessel. 936 F.2d at 845; writ petition, page A-19.

D. The Fifth Circuit's Second Opinion—The Opinion on Remand

On November 23, 1991, Petitioner applied to the United States Supreme Court for a Writ of Certiorari. This Court granted Petitioner's writ and remanded the case to the United States Court of Appeals for the Fifth

Circuit for further consideration in light of *Southwest Marine, Inc. v. Gizoni*, 502 U.S. ——, 112 S.Ct. 486, 116 L.Ed.2d 405 (1991). On July 7, 1992, the Fifth Circuit affirmed, again holding that Petitioner was not entitled to bring a negligence action either as a seaman under the Jones Act or as a shipbuilder/ship repairer under § 905(b) of the LHWCA.

In its second opinion, the Fifth Circuit clearly stated that the portion of its first decision recognizing that a ship repairer was barred from bringing a negligence action under § 905(b) of the LHWCA against his employer remained correct and was not affected whatsoever by the *Gizoni* decision. *Easley v. Southern Shipbuilding Corp.*, 965 F.2d 1 (5th Cir. 1992), reproduced at pages A-24 through A-33 of Petitioner's writ petition. Accordingly, the Fifth Circuit affirmed the district court's holding and its own prior ruling that because Petitioner was a ship repairer within the meaning of the LHWCA, § 905(b) precluded him from bringing a negligence action against his employer or its vessel.

While the Fifth Circuit affirmed its prior ruling on this issue, its second opinion mistakenly cited a *pre*-1984 version of § 905(b) rather than the statute's *post*-1984 amendment version, which had been relied on by the district court and the Fifth Circuit in its original decision. Before the 1984 amendment § 905(b) prevented a ship repairer from asserting a negligence claim against his employer only if the injury were caused by the negligence of a fellow ship repairer or shipbuilder; thus, the status of the person who injured the ship repairer determined whether the ship repairer could maintain a § 905(b) negligence action against his employer. However, the 1984 amendment to § 905(b) *completely barred* a ship repairer from bringing a negligence action against his employer, regardless of the employment status of the person who caused the ship repairer's injury. This quotational error by the Fifth Circuit did not affect the correctness of its

holding that this petitioner, as a ship repairer, had no legally recognized negligence cause of action for a 1989 accident against his employer under 33 U.S.C. § 905(b).

The Court of Appeals also found upon reconsideration that Petitioner was not a Jones Act seaman. The Court held that while *Gizoni* required a different analysis than it had applied in its earlier decision, it did not lead to a different result. The Fifth Circuit's second decision was not, as Petitioner claims, based solely on the fact that Petitioner spent at most only eleven and a half percent of his time on a vessel (writ petition, page 6). Rather, following an analytical and well-reasoned opinion, the Fifth Circuit stated:

> [C]onsidering this circuit's *consistent precedent*, it is *impossible* for us to conclude that Easley, who spent at most eleven and a half percent of his time on a vessel, was a seaman for purposes of the Jones Act, *particularly when viewed in light of other factors affecting his connection with the subject vessel.* (Emphasis added).

965 F.2d at 5; writ petition, page A-33. Therefore, the Fifth Circuit found no reversible error in the district court's summary judgment holding that Petitioner was not a Jones Act seaman.

Accordingly, in its second decision, the Fifth Circuit again concluded that Petitioner was not entitled to bring a negligence action against his employer either as a seaman under the Jones Act or as a shipbuilder/ship repairer under § 905(b) of the LHWCA. It, therefore, found no reversible error and affirmed the district court's grants of summary judgment.

REASONS FOR DENYING THE WRIT

I. THE FIFTH CIRCUIT AND THE DISTRICT COURT CORRECTLY FOUND THAT PETITIONER, AS A SHIP REPAIRER OR SHIPBUILDER, WAS NOT ENTITLED TO BRING A NEGLIGENCE ACTION AGAINST RESPONDENT UNDER § 905(B) OF THE LHWCA.

The Fifth Circuit Court of Appeals in its first opinion and the district court on summary judgment correctly held that because Petitioner was a ship repairer or shipbuilder, his "recovery under the LHWCA is limited to compensation benefits to the extent he is eligible for them." 936 F.2d at 845; writ petition, page A-19; writ petition, page A-4. The undisputed facts clearly and unequivocally established that Petitioner was a ship repairer or shipbuilder for the purposes of the LHWCA. Consequently, the express terms of § 905(b) preclude Petitioner from asserting an action for negligence against his employer or its vessel. 936 F.2d 839; writ petition, page A-8; writ petition, pages A-1 through A-6. There is, therefore, no basis for a writ of certiorari on this issue.

The sole basis for Petitioner's first question presented for review is the Fifth Circuit's mistaken quotation to § 905(b) as it existed *prior* to the 1984 amendment. The Petitioner relies on the Fifth Circuit's statement in its second opinion that Petitioner, as a ship repairer for the purposes of § 905(b) of the LHWCA, was

> barred by the terms of that section from maintaining a negligence action against his employer, *assuming that "the injury was caused by the negligence of persons engaged in providing shipbuilding or repair services."*

965 F.2d at 4; writ petition, page A-28. (Emphasis added). Based on this mistaken quotation to the *pre*-1984 amendment version of § 905(b), Petitioner claims

the Fifth Circuit erred as a matter of fact when it concluded that:

> [B]ecause Easley's injury was caused by the negligence of persons engaged in providing shipbuilding or repair services, his claim against his employer, who was also the vessel owner, under the LHWCA, Section 905(b) is barred.

Petitioner's writ petition, page 6.

Petitioner's argument is flawed because the Fifth Circuit's second opinion, unlike its first opinion or the district court's decision, incorrectly quoted to § 905(b)'s language before the 1984 amendment to § 905(b). Section 905(b)'s *pre*-1984 amendment language allowed a ship repairer or shipbuilder to maintain a negligence action against an employer-vessel owner if an accident were caused by an employee who was *not* working as a ship repairer or shipbuilder. However, § 905(b) was amended in 1984 as follows:

> Subsec. (b). Pub. L. 98-426 § 5(a)(1), substituted 'If such person was employed to provide *shipbuilding, repairing*, or breaking services *and such person's employer was the owner*, owner pro hac vice, agent, operator or charterer *of the vessel, no such action shall be permitted*, in whole or in part or directly or indirectly, *against the injured person's employer* (in any capacity, including as the vessel's owner, owner pro hac vice, agent, operator, or charterer) or against the employees of the employer' *for* 'If such person was employed by the vessel to provide shipbuilding or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing shipbuilding or repair services to the vessel.' (Emphasis added).

1984 U.S. Code Cong. & Admin. News 2734. Thus, the 1984 amendment to § 905(b) completely and unconditionally eradicated a ship repairer or shipbuilder's right to maintain a negligence action against his employer-

vessel owner, regardless of the status of the employee who caused an injury to the ship repairer or shipbuilder.

Because it is premised on an inaccurate legal citation, Petitioner's factual error argument lacks merit. Controlling law at the time of Easley's 1989 accident precludes this ship repairer from asserting any negligence action against his employer regardless of the status of the employee who caused his injury. As amended in 1984, § 905(b) clearly and without exception provides that a shipbuilder or ship repairer, such as Petitioner, is prohibited from bringing a negligence action against his employer-shipowner. It was Petitioner's employment status as a shipbuilder or ship repairer which unconditionally bars his claim against Respondent, *not* the employment status of those whose negligence allegedly caused Petitioner's injury. Consequently, considering the controlling law at the time of Petitioner's accident, whether Petitioner's alleged injury was caused by the negligence of a fellow shipbuilder/ship repairer or by a vessel crew member is irrelevant and immaterial.

The Fifth Circuit's quotation to the *pre*-1984 version of § 905(b) in its second opinion was harmless error. The Petitioner's rights clearly were governed by the 1984 amendment to § 905(b) that absolutely prohibited a ship repairer from asserting a negligence action against his employer. Thus, though its reference to the *pre*-1984 § 905(b) language was in error, the Fifth Circuit's conclusion in its second opinion was correct.

Importantly, the Fifth Circuit's original decision and the district court's decision on summary judgment applied the 1984 amendment version of § 905(b) as the controlling law and correctly concluded that Petitioner, as a ship repairer, had no § 905(b) negligence action against his employer. 936 F.2d 839, 845; writ petition, pages A-14 and A-19; and writ petition, pages A-4 through A-6. The lower courts' conclusion that this ship

repairer's exclusive remedy was compensation under the LHWCA was correct, and there is no basis for granting a writ on this issue.

II. THE FIFTH CIRCUIT AND THE DISTRICT COURT CORRECTLY CONCLUDED PETITIONER WAS NOT A JONES ACT SEAMAN AS A MATTER OF LAW.

Petitioner's second question presented for review, concerning seaman status, provides no valid reason for this Court to issue a writ. Petitioner is essentially asking this Court to overturn a proper summary judgment of dismissal, even though he can point to no error of law or any genuine issue of material fact that would warrant a trial on the merits. The issue of Petitioner's alleged seaman status was decided by the district court, affirmed by the Fifth Circuit Court of Appeals, and, upon reconsideration as instructed by this Court, reaffirmed by the Fifth Circuit on remand. 965 F.2d 1; writ petition, page A-24; 936 F.2d 839; writ petition, page A-8; writ petition, page A-1. In each decision of the courts below, after examining the undisputed facts and correctly applying controlling legal standards, it was determined that no reasonable fact finder could conclude that Petitioner was a Jones Act seaman. Furthermore, we note for the Court that in his second question presented for review, Petitioner basically reasserts the exact same argument made to this Court in the second question presented for review in his previous petition for a writ of certiorari on November 23, 1991. Now, as then, there is no merit to that argument.

Petitioner claims that the motion for summary judgment should have been denied because "there is much evidence to support a finding that [Petitioner] was, in fact, a seaman." *See* writ petition, page 10. Petitioner argues that "as the regular substitute deckhand aboard the D/B SOUTHERN No. 6 who was assigned to that ves-

sel for the length of its one day voyage he was entitled to present his claim of Jones Act seaman's status to a jury." *See* writ petition, page 9. Without more, those allegations do not satisfy the legal test for seaman status.

To qualify as a Jones Act seaman, Petitioner must prove that he was either *permanently* assigned to a vessel or performed a *substantial* part of his work on it. Petitioner clearly failed to meet either requirement. Petitioner admits that he was never "permanently" assigned to his employer's vessels, but only worked on them temporarily. His work aboard the D/B SOUTHERN NO. 6 was for only one day. *See* writ petition, pp. 4-5. Petitioner also did not perform a substantial amount of his work on vessels. As set forth in *Barrett v. Chevron, USA, Inc.*, 781 F.2d 1067, 1074 (5th Cir. 1979), to satisfy the requirement of "substantial work," the claimant must prove a relationship to a vessel "that is substantial in point and time and not merely spasmodic." In the present case, the Fifth Circuit, on remand, clearly addressed Petitioner's argument concerning his relationship to the vessel:

> Easley was not permanently assigned to the NO. 6; he was a land-based employee. Neither did he perform a substantial part of his work on the vessel. Clearly neither *Robison* nor *Wilander* and *Gizoni* envision a "snapshot" test for seaman status, inspecting only the situation as it exists at the instant of injury; a much more enduring relationship is contemplated in the jurisprudence. At least three cases in this circuit involved workers who spent greater percentages of their employment time on vessels than did Easley, yet the worker in each case was held not to be a seaman as a matter of law. (Footnote omitted). We do not imply that the quantum or percentage of a worker's time spent on a vessel in navigation is either the sole factor or the determinative factor in the search for seaman status. But considering this circuit's consistent precedent, it is impossible for us to conclude that Easley, who spent at most eleven and

> a half percent of his time on a vessel, was a seaman for purposes of the Jones Act, particularly when viewed in light of other factors affecting his connection with the subject vessel.

965 F.2d at 5; writ petition, pages A-32-33.

Petitioner ignores this established legal standard when he argues that he could not be covered by the LHWCA because he "was, in the words of his boss on the date of the accident, a deckhand assigned to the D/B SOUTHERN No. 6." *See* writ petition, pages 10 and 11. By arguing that he was working as a deckhand at the time of his accident, Petitioner contends he is legally entitled to seaman status based solely on a job title alone, rather than the totality and nature of the actual work he performed. This approach was expressly rejected in *Gizoni*, which teaches that the proper inquiry is whether the nature of the claimant's work makes him a sea-based employee instead of a land-based worker. Applying *Gizoni's* logic, the Fifth Circuit on remand concluded, based on undisputed facts, that Petitioner did not have a sufficient employment-related connection to a vessel in navigation to be considered a seaman:

> Irrespective of the traditional maritime nature of Easley's work on the occasions when he was aboard the NO. 6, the irregularity of his intermittent stints of short duration on that vessel, sporadically interspersed between long periods of performing his regular land-based functions, eschews the substantial and enduring relationship to the vessel envisioned in *Gizoni*, *Wilander*, and *Lawson*. Easley's connection to the NO. 6 was simply too attenuated to constitute seaman status.

965 F.2d at 5; writ petition, A-32. Thus, the Fifth Circuit correctly premised its second decision on this Court's legal test for seaman status.

Seaman status is properly decided on summary judgment in appropriate cases. In *McDermott Int'l., Inc. v.*

Wilander, 498 U.S. ——, 111 S.Ct. 807, 112 L.Ed.2d 866 (1991), and *Southwest Marine, Inc. v. Gizoni*, 502 U.S. ——, 112 S.Ct. 486, 116 L.Ed.2d 405 (1991), this Court held that the question of who is a "member of the crew" or "seaman" is "a mixed question of law and fact." Although the question of seaman status is necessarily fact-specific, this Court has recognized that "summary judgment or a directed verdict is mandated where the facts and the law will reasonably support only one conclusion." *Wilander*, 111 S.Ct. at 818, citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 250-251 (1986). "When the underlying facts are established, and the rule of law is undisputed, the issue is whether the facts meet the statutory standard." *Wilander*, 111 S.Ct. at 818, citing *Pullman-Standard v. Swint*, 456 U.S. 273, 289 n.19 (1982). If no genuine issue of material fact exists as to whether the worker was a seaman under the Jones Act, then a maritime worker employed by a shipyard is limited to LHWCA remedies. *Gizoni*, 112 S.Ct. at 492.

Considering this legal standard, the district court's summary judgment on seaman status was clearly correct. Applying this Court's mandate for deciding summary judgment motions enunciated in *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986), the district court and the Fifth Circuit (in both opinions) accepted as true Petitioner's assertions that he worked 11.5% of his time on the vessel, but necessarily found that his assignment to the vessel was "intermittent and transitory while his permanent job assignment remained land-based." *See* writ petition, page A-3. The Fifth Circuit found that "even accepting [Petitioner's] argument that he was a 'regular' substitute deckhand," Petitioner's "sporadic and intermittent assignments to Southern's vessels were simply not substantial in the context of his employment." 936 F.2d 844-845; writ petition, page A-18. Under these circumstances, summary judgment was not only consistent with this Court's jurisprudence, but was mandated by it. *See Celo-*

tex, 477 U.S. 317; *see also* Anderson, 477 U.S. 242; and *Matsushita Electric Industrical Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).[1]

The undisputed facts in this case, when viewed in the light most favorable to Petitioner, establish that Easley

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[1] As Respondent presented to this Court in its previous Brief in Opposition in this case, dated February 21, 1992, summary judgment dismissing Easley's Jones Act claim was likewise consistent with a long line of prior decisions in several circuits denying seaman status to shore-based workers with only intermittent relationships to vessels. *See Griffith v. Wheeling Pittsburgh Steel Corp.*, 521 F.2d 31 (3rd Cir. 1975), *cert. denied*, 423 U.S. 1054 (1976), holding that a land-based laborer's temporary assignment to work with a barge crew for only three and three-quarter days of his 74 days of employment did not satisfy the requirement of a permanent connection to a vessel and, as a matter of law, did not give rise to seaman status; *Whittington v. Sewer Construction Co.*, 541 F.2d 427 (4th Cir. 1976), holding that a shore-based worker who had incidental and intermittent duties aboard a barge moored to a bridge was not a seaman; *Lormand v. Superior Oil Co.*, 845 F.2d 536 (5th Cir. 1987), *cert. denied*, 484 U.S. 1031 (1988), granting summary judgment denying seaman status to a welder who performed only 14 percent of his work activity aboard vessels; *Stokes v. B.T. Oilfield Services, Inc.*, 617 F.2d 1205 (5th Cir. 1980), granting summary judgment denying seaman status to a land-based roustabout who lacked permanent attachment to a vessel, where in his 28 work days before his accident aboard a barge, he had spent 27 days in land-based employment and only one day at sea; *Fazio v. Lykes Bros. S.S. Co.*, 567 F.2d 301 (5th Cir. 1978), granting summary judgment denying seaman status to a shore gang worker who performed no permanent duties aboard vessels, though from time to time he did perform transitory vessel repair jobs; *Labit v. Carey Salt Co.*, 421 F.2d 1333 (5th Cir. 1970), granting summary judgment denying the Jones Act claim of a shore-based worker who loaded vessels with bulk salt and who only occasionally and sporadically operated a power boat to position the vessel for loading; *Miller v. Patton-Tully Transportation Co.*, 851 F.2d 202 (8th Cir. 1988), denying seaman status to a bulldozer operator who spent only one-third of his time on water, which was not "substantial" enough a part of his work to qualify him as a seaman; *Bullis v. Twentieth Century-Fox Film Corp.*, 474 F.2d 392 (9th Cir. 1973), granting summary judgment denying seaman status to off-duty servicemen acting as temporary or transitory extras on a vessel during filming of a motion picture.

was a land-based shipyard mechanic who was neither permanently attached to a vessel nor performed a substantial part of his work on a vessel. Accordingly, Petitioner failed to carry his burden of proving seaman status. Consistent with this Court's jurisprudence, the district court properly granted summary judgment dismissing his Jones Act claims, and the Fifth Circuit, both initially and on remand, correctly affirmed the district court's decision. For these reasons, Petitioner's application for a writ of certiorari should be rejected.

CONCLUSION

The decisions of the district court and the Fifth Circuit holding that Petitioner is not entitled to bring a negligence action against his employer either as a ship repairer/shipbuilder under § 905(b) of the LHWCA or as a seaman under the Jones Act were correct. The courts below correctly concluded that § 905(b) precluded this ship repairer from asserting a negligence cause of action against his employer-vessel owner. The Fifth Circuit's mistaken citation to a *pre*-1984 version of § 905(b) was a harmless error and did not affect the correctness of its prior decision or the district court's summary judgment on this issue. The Fifth Circuit also properly followed this Court's decisions in *Gizoni* and *Wilander* and correctly found no reversible error in the district court's summary judgment holding that Easley was not a Jones Act seaman as a matter of law.

Petitioner has presented no meritorious reasons for granting certiorari. The Fifth Circuit's decision on remand does not conflict with any decision of this Court or of any other United States Court of Appeals on the matter presented in this case, nor does this case present any unsettled or important question of law that this Court has not already decided. For the reasons discussed above, Respondent, Southern Shipbuilding Corporation, respectfully submits that this Court should deny Petitioner's request for a writ of certiorari.

Respectfully submitted,

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